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**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO FSD 163 OF 2016 (IMJ)

IN THE MATTER OF THE A TRUST

AND IN THE MATTER OF THE TRUSTS LAW (2011 REVISION)

AND IN THE MATTER OF GCR ORDER 85, RULE 2(2)(a)



IN CHAMBERS AND IN PRIVATE

Appearances: Mr. Alan Turner of Turners for the Applicant trustee of the A Trust

Before: The Hon. Justice Ingrid Mangatal

Heard: 18 November 2016

Draft Judgment

Circulated: 29 November 2016

Judgment

Delivered: 01 December 2016

HEADNOTE

Trusts Law (2011 Revision) – s.48, s.90-93 – Firewall Provisions – Trusts – Pt VIII – STAR Trust - Directions sought whether Trustee of STAR Trust should submit to jurisdiction of English Court in Matrimonial Proceedings – whether Trustee should disclose further confidential information.

JUDGMENT

1. This is an application by C Ltd., the trustee (“The Trustee”) of the A Family STAR Trust (“the A Trust”). The Trustee became trustee of the A Trust on the 16 June 2016, pursuant to a Deed of Retirement and Appointment of Trustees. The previous trustee was

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Z Ltd. The application is for directions pursuant to section 48 of *the Trusts Law (2011 Revision)*. I agree with Mr. Turner, Counsel for the applicant, that this application falls within the second category of applications recognised by Mr. Justice Hart in the oft-cited case of *Public Trustee v Cooper* [2001] WTLR 90.

2. Mr. Justice Hart (at page 17 of the judgment) followed the categories outlined in the unreported ruling of Walker J (as he then was), where he analysed trustee applications as follows:

“At the risk of covering a lot of familiar ground and stating the obvious, it seems to me that, when the court has to adjudicate on a course of action proposed or actually undertaken by trustees, there at least four distinct situations (and there are no doubt numerous variations of those as well).



- (1) *The first category is where the issue is whether some proposed action is within the trustees' powers. That is ultimately a question of construction of the trust instrument or a statute or both. The practice of the Chancery Division is that a question of that sort must be decided in open court and only after hearing argument from both sides. It is not always easy to distinguish that situation from the second situation that I am coming to....*
- (2) *The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that there is no surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to*

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accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries.

(3) *The third category is that of surrender of discretion properly so called. There the court will only accept a surrender of discretion for a good reason, the most obvious good reason being that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest. Cases within category (2) and (3) are similar in that they are both domestic proceedings traditionally heard in Chambers in which adversarial argument is not essential though it sometimes occurs. It may be that ultimately all will agree on some course of action or, at any rate, will not violently oppose some particular course of action. The difference between category (2) and category (3) is simply as to whether the court is (under category (2)) approving the exercise of discretion by trustees or (under category (3)) exercising its own discretion.*

(4) *The fourth category is where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers. Cases of that sort are hostile litigation to be heard and decided in open court....”*

3. A.J., who is a director of the Trustee, has sworn an affidavit in support of this application.

He outlines the directions sought, as follows:

- 1) Whether the Trustee should submit to the jurisdiction of the English courts and participate in the matrimonial proceedings involving A and his estranged wife N.
- 2) Whether the Trustee should disclose further confidential information to the parties to the English matrimonial proceedings.

4. The Trustee has determined not to either submit to the jurisdiction of the English courts or provide further confidential information. However, because it is an important step for a professional trustee to refuse to submit to the jurisdiction of a foreign court, the Trustee seeks the guidance of this Court.



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5. I am informed that there has already been a similar application before the Gibraltarian courts in the matter of the A C Trust, (or “the L Trust”) and the Supreme Court of Gibraltar has directed the Trustee of the L Trust to do neither. A copy of the ruling was provided to me at this hearing. The Settlor of the L Trust is the same Settlor as the Settlor of this Trust, A, referred to in more detail in paragraph 10 below.



FACTUAL BACKGROUND

6. There are divorce proceedings ensuing between A and N in the High Court of Justice in England and Wales (“the English High Court”). There are four children of the marriage between A and N. The four children are named parties to the English matrimonial proceedings. The children are I, (born 17 April 1997), O, (born 12 January 1998), H, (born 15 February 2000), and R, (born 18 August 2001). I and O are adults, while H and R are minors.
7. I and O are represented in the proceedings. Although H and R are unrepresented in the proceedings, the Court has expressed the view that their interests are very similar to O’s.
8. In addition to the four children, the former trustee Z Ltd. and L Trust and recently all of the companies directly or indirectly held by the Settlement are parties to the divorce proceedings. The former trustee and L Trust had retained a firm of lawyers to advise them in connection with the divorce proceedings. The Trustee has advised all of the parties to the English proceedings that it has now taken over as trustee and has been made a party to those proceedings.
9. In the matrimonial proceedings, N seeks, amongst other orders, a variation of the Settlement pursuant to section 24(1)(c) of the English Matrimonial Causes Act (“the MCA”), and the setting aside of N’s exclusion as a beneficiary of the Settlement under section 37 of the MCA.

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10. The Settlor of the Trust is A (“the Settlor”) who is the Chief Executive Officer (“CEO”) of a major property company in the UK (“CC”).

11. The Trust is a Cayman Islands STAR Trust. The proper Law of the Trust, according to Clause 14 of the Trust Deed, is Cayman Islands Law and the Cayman Islands courts are the forum for its administration.

12. The object of the Trust is outlined on paragraph 5 of the Trust Deed, and failing that the objects are set out in paragraph 6.

13. The asset of the Trust is shares in HHL, which is a Cayman Islands Company with its own board of directors. HHL owns shares in other companies in the structure, some of which hold legal title to assets in the UK.

14. Through various Deeds of Exclusion, the Settlor, his wife and their children are excluded from benefit under the Trust. The effect of these Deeds of Exclusion is that only children who were minors when the Deeds were executed but who attain majority thereafter can be beneficiaries along with the remoter issue of the Settlor and their spouses, widows, widowers and charity. O is currently a beneficiary. I is excluded as a beneficiary.

15. The Settlor has executed Letters of Wishes in the past, his most recent being dated 9 July 2012. The Settlor does appear to have quite detailed views about how the assets of the Trust should be applied in the future to benefit the classes of beneficiaries and in particular, he wishes to ensure that beneficiaries do not live lavish lifestyles funded by the Trust, but yet ensuring that they receive appropriate benefit from the Trust in the future.

16. The Settlor’s main desire is to see the Trust grow from generation to generation and to be a charitable trust providing support for the main charitable object specified.

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17. The position taken by the former Trustee in relation to the ongoing Divorce proceedings, on legal advice, was that its provision of information and/or documents to explain its position in relation to the Divorce proceedings would not amount to a submission to the jurisdiction of the English High Court. The former Trustee and L Trust exchanged position statements with the parties on 22 February 2016.

18. A.J. in his affidavit advises that very little information was provided in relation to the Settlement due to the restrictions which exist on providing confidential information about the Settlement in these circumstances.

19. The former Trustee explained that it had no knowledge of the grounds upon which N sought to contend that the Settlement might be varied and the grounds on which her exclusion from the Settlement could be set aside.

20. The former Trustee also explained its position that any variation of the terms of the Settlement or any challenge to N's exclusion from the Settlement should only be made in accordance with the laws of the Cayman Islands and by the Grand Court of the Cayman Islands. That is also the current position taken by the Trustee.

21. The Enforcer of the A Trust named in the Trust Deed is ArJ ("the Enforcer"). The Enforcer has confirmed to this Court that he supports the position of the Trustee not to submit to the jurisdiction of the English High Court and also not to provide any further documentation belonging to the Trust.

LEGAL POSITION

22. The Trustee is bound to administer the A Trust in accordance with its terms and the governing law, which is the law of the Cayman Islands. I accept Mr. Turner's submission that the claim by N to vary the Trust, and setting aside her exclusion, using provisions in a foreign statute are in essence third party claims, as categorized by Lightman J in *Alsop*

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Wilkinson v Neary [1996] 1 W.L.R. 1220, at page 1224C. It is the Trustee's duty to protect and preserve the A Trust from such claims.

23. The evidence is that N has not yet particularised her case for variation of the Trust and for setting aside of her exclusion. Counsel submits that whilst it is clear that N has an arguable case, success for her is far from certain. The significance of this particular point is that it is in the interests of the beneficiaries that any counterarguments to N's arguments be advanced in the English High Court. It is AJ's evidence that it is proposed that this should be done by O, whose legal costs are being funded for this purpose. In my view, it does appear that all relevant arguments ought to be capable of being put forward by the respondents in the English matrimonial proceedings.

24. A brief overview of some of the arguments and issues that will arise in the English proceedings assists in providing a backdrop for consideration of the appropriate directions to give to the Trustee. N's primary application to vary the A Trust for her benefit is made under s. 24(1)(c) of the MCA. So far as material, that sub-section provides as follows:



"s.24 (1) On granting a divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say....

(c) an order varying for the benefit of the parties to the marriage and of the children of the family or either of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage..."

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25. In *Ben Hashem v Shayif* [2008] EWHC 2380 (Fam), paragraph 29, Mummy J expressed the view that the exercise of the statutory jurisdiction involves the following three questions:

- a. Is there a settlement within the meaning of section 24(1)(c)?
- b. If so, what is the property comprised in that settlement?
- c. If there is a settlement, should the Court exercise its jurisdiction?

a. Is there a settlement within the meaning of section 24(1)(c)?

26. Whilst it may well be that the Trust will be considered a settlement for the purposes of s.24, the real issue will be whether it has the necessary nuptial element. Some of the issues involved will require the Court to consider whether the Trust had the necessary nuptial element when it was created. In that regard, the House of Lords' decision in *Brooks v Brooks* [1996] AC 375 HL may shed some light. If the Trust was a post-nuptial settlement in relation to the marriage of the Settlor and N, the Court would have to consider the question whether it ceased to be a nuptial settlement when they were both excluded.

b. What is the property of the settlement?

27. If the Trust is a post-nuptial settlement, then the property of the settlement is its trust fund. This comprises shares in a Cayman Islands company HHL and it may well be argued that prima facie, any order varying the Trust can only be enforced against the Trustee or the Trust fund. However, it is unlikely that such orders would be enforced in the Cayman Islands for reasons discussed below.

28. The underlying companies in the Trust own substantial real property situated in the UK. However, they are the property of these companies and are not prima facie part of the Trust fund. It is highly arguable that it is the shareholding in HHL which forms the Trust Fund and not the properties. This issue will bring into sharp focus the knotty questions regarding the limited grounds upon which the corporate veil can be lifted. This was discussed in the well-known UK Supreme Court decision in *Prest v Petrodel* [2013]

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UKSC 34, where, at paragraph 8, Lord Sumption discussed the issues from the premise as follows:



“Subject to very limited exceptions, most of which are statutory, a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own which are distinct from those of its shareholders. Its property is its own, which are distinct from those of its shareholders.”

29. Thus, there will be real issues as to the correct identification of the property which is the subject of any post-nuptial settlement and this would in turn have ramifications for the enforcement of any order.

c. How should the Court exercise its jurisdiction?

30. If that question does arise, it would seem from the *Ben Hashem* case that the Court’s objective will be to achieve a fair result as between the Settlor and N, and that it will strive to do so with the minimum interference to the settlement and the rights of the beneficiaries, as is necessary for that purpose.

ENFORCEMENT

31. The Trustee is outside the jurisdiction of the English High Court and so far has not submitted to its jurisdiction. It seems clear that any order made by the English High Court against the Trustee under s. 24(1)(c), will not be enforced against the Trustee, the beneficiaries of the Trust or the Trust Fund. The effect of Cayman’s firewall legislation in sections 90-93 of the Trusts Law, was succinctly described by Henderson J in his helpful decision in *In the matter of the B Trust* [2010] 2 CILR as follows:

“A trust in the Cayman Islands can only be varied in accordance with the law of the Cayman islands and only by a court of the Cayman Islands”.

32. The approach to the question of whether a trustee such as the Trustee in this case should submit to the jurisdiction of the English High Court was considered by the Royal Court

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of Jersey in *In the Matter of the H Trust* [2006] JLR 280. This case was reviewed in detail and applied by Henderson J in *In the matter of the B Trust*.

33. From *In the matter of B Trust*, a number of principles may be seen. Firstly, an order of the English High Court is unenforceable in the Cayman Islands whether or not the Trustee submits to the jurisdiction, because of the terms the firewall legislation. Were the Trustee to submit to the jurisdiction of the High Court this could potentially create a situation where there is conflict between its duty to observe the terms of the Trust and its obligation to comply with the terms of the order of the High Court. As Henderson J observed at paragraph 25 in *Re the B Trust*:



"The trustee's duty is, of course, to carry out the trust according to its terms unless some deviation from that has been sanctioned by this court: Underhill & Hayton, Law relating to Trustees, 17th ed., para 47.1, at 613-614(2007). It would be unwise and inappropriate for a trustee to allow itself to be placed in a situation where its trust obligation comes into conflict with an obligation to obey an order of a foreign court."

34. Secondly, firewall legislation like ss. 90-93 of the Law does not affect the trustee's discretionary powers. This is well discussed at paragraphs 73-74 of the Royal Court's decision in *In the IMK Family Trust*, 2008 JLR 250 referred to at paragraph 4.23 of the Trustee's written skeleton argument. In this case, however, it may well be that the powers of the Trustee are curtailed by the exclusion of the Settlor and N as beneficiaries.
35. Thirdly, it would appear, that even in cases where the trustees do have the power to give effect to an order, it is generally not in the best interests of the beneficiaries for trustees protected by firewall legislation to submit to the jurisdiction of the foreign court. In *Re H Trust* where the Royal Court took the view that submission to jurisdiction increased the likelihood of an English order becoming enforceable in Jersey, the following point was made at paragraph 15:

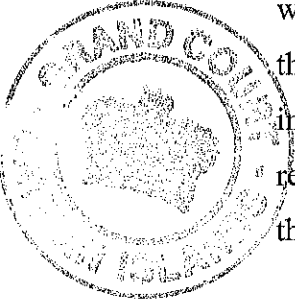
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“It follows that, in most circumstances, it is unlikely to be in the interests of a Jersey trust for a trustee to submit to the jurisdiction of an overseas court which is hearing divorce proceedings between a husband and wife, one or both of whom may be beneficiaries under the trust. To do so would be to confer an enforceable power upon the overseas court to act to the detriment of the beneficiaries of a trust when the primary focus of that court is the interest of the two spouses before it. It is more likely to be in the interests of a Jersey trust and the beneficiaries thereunder to preserve the freedom of action of both the trustee and this court to act as appropriate following and taking full account of the decision of the overseas court. We have said that this is likely to be the case in most circumstances. In some cases, e.g. where all the trust assets are in England, it may well be in the interests of a trustee to appear before the English Court in order to put forward its point of view because, by reason of the location of the assets, that court will be able to enforce its order without regard to the trustee or this court.”



36. I accept Mr. Turner’s submission that it follows that there would have to be some compelling reason pointing in that direction, for it to be in the interests of the beneficiaries that the Trustee submit to the jurisdiction of the High Court. In my judgment, no such reason compels itself to me in the instant case, why the Trustee should submit to the jurisdiction of the Courts of England and Wales.
37. If the Trustee does not submit to jurisdiction, the question arises whether it should nevertheless be authorised by this Court to provide the further information sought.
38. As a matter of general trust law, it is a trustee’s duty to account to beneficiaries for the administration of the trust property. The duty to account requires the provision of information (not just documentation) to the relevant beneficiaries. The Privy Council in **Schmidt v Rosewood** [2003] UKPC 2, made it clear, at page 20 that no beneficiary has any legal entitlement to trust information, but that a beneficiary with sufficient interest

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who is dissatisfied with the disclosure which a trustee proposes can seek an order from the Court against the trustee, and the Court will then exercise its supervisory jurisdiction in relation to administration of trusts, and if appropriate, intervene. The court in that regard may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties.

39. However, the A Trust is a STAR Trust governed by Part VIII of the Trusts Law which modifies the general provisions in respect of such trusts. The beneficiaries have no standing to enforce the trust at all, all such rights being vested in the Enforcer, who has the sole right to information from the Trustee. Thus, anyone else seeking information from the Trustee are analogous to strangers seeking information in an ordinary trust, to which such persons would have no entitlement. In both situations, the consideration must be whether or not the Trustee providing such information and documentation to such persons is in the best interests of the Trust.

40. In Jersey, where much learning in this area of the law has been developed, there appears to be a general tendency to regard it, as Mr. Turner has argued by reference to a number of cases, as being in the interests of the beneficiaries for the spouse to have some basic trust information. In *Re H Trust*, the Royal Court, at paragraph 17 stated as follows:

“We should add that a decision that the trustee should not submit to the jurisdiction is separate from the question of provision of information. It seems to us important, in this case, that the husband and the wife, should have the fullest information concerning the financial affairs of the trust so that any compromise which they reach, failing which any decision of the Family Division, is based upon the true financial position. ..”

41. See also *Re Rabaiotti* (2000) 2 ITEL 763 - disclosure of letter of wishes, particularly where a party to divorce had a copy of previous, but outdated version, and *Re The Avalon* [2006] JRC 105 a, and *In U Limited v B* [2011] JLR 452, where trust accounts and accounts of the underlying companies were disclosed subject to confidentiality

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restrictions although the divorcing spouses were not beneficiaries, because, amongst other things, the trust concerned was one of a number of trusts set up for the benefit of the family and it was important for the High Court to have an accurate picture of the finances for all the trusts.

42. On the evidence, N already has a considerable amount of information in relation to the A Trust. It appears from a letter dated 18 March 2016 that the Settlor has the Trust Deed and all Supplemental Instruments and has disclosed them to the other parties to the litigation, including N. In addition, A.J. gives evidence that the Settlor has, without the permission of the former Trustee, provided N and O with full financial information for the underlying companies in the structure.
43. In my judgment, it is reasonable to conclude that N has sufficient information to understand the terms of the Trust and its finances. Further, that for the Trustee to either submit to the jurisdiction of the English High Court or provide further information is not in the best interests of the beneficiaries.
44. In all of the circumstances, I direct as follows:
- a. That the Trustee should not submit to the jurisdiction nor participate in the proceedings before the Family Division of the High Court of Justice in England and Wales bearing the case number set out in the Draft order provided for this hearing (“the proceedings”);
 - b. That the Trustee should not provide further disclosure of documents nor answer any questions relating to the Trust or its assets in connection with the proceedings;
 - c. That the Trustee be paid its costs of this application from the assets of the Trust to be agreed or taxed on an indemnity basis.


THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT

